76-1077
No.

In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, PETITIONER

v.

SECURITY NATIONAL BANK

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-7a) is not yet reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, pp. 8a-9a) was entered on December 6, 1976. On

December 29, 1976, Mr. Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including February 4, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Double Jeopardy Clause applies to corporations.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> * * * [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb; * * *.

2. The Criminal Appeals Act, 18 U.S.C. 3731, provides in pertinent part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

STATEMENT

On September 5, 1975, respondent corporation was indicted in the United States District Court for the Eastern District of New York; it was charged with

nine counts of making unlawful political contributions, in violation of 18 U.S.C. 610. The evidence at trial showed, and respondent admitted, that three officers of the bank [1] asked other bank officers to make monthly political contributions of $100. Respondent deemed these contributions essential to its business success, and particularly its ability to obtain non-interest bearing municipal accounts (App. A, *infra*, pp. 1a-2a).

Respondent gave to each officer involved in this scheme a salary increase of $1,700 a year; $1,200 of this additional salary repaid the cost of the contributions, and the other $500 was used to cover any additional tax liability on the receipt of the $1,200. The total cost of this program, which involved more than 40 officers, was several hundred thousand dollars.

Several of respondent's officers also were indicted. The individual defendants claimed that they believed the scheme was lawful. They stated that counsel told them that they could participate in respondent's program if the salary increases were permanent, to be paid even after an officer decided to cease making

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[1] The three officers were charged with conspiring to cause the bank to make the unlawful contributions. These same officers were also charged with conspiracy to misapply bank funds in violation of 18 U.S.C. 656, and one of them was charged with making false statements in violation of 18 U.S.C. 1001 (App. A, *infra*, p. 2a).

The Statement in this petition recapitulates the statement in the brief for the United States in the court of appeals. Respondents did not challenge this statement in any material detail.

political contributions.[2] Respondent could not invoke the advice-of-counsel defense.[3]

Both respondent and the individual defendants argued, however, that the program was legal because the salary increases were permanent.[4] They maintained that the political contributions made by the officers, on behalf of the bank, to beneficiaries chosen by senior bank officers, came from the officers' money and not the bank's money. Hence, they argued, there was no violation of Section 610, even though no officer received the additional salary unless he first agreed to participate in the political contributions program.

The district court agreed with respondent's interpretation of Section 610. The prosecution objected and, at the suggestion of the district judge (A. 2755), filed a mid-trial petition for a writ of mandamus. Mandamus was denied.[5] The district court

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[2] Counsel denied having given such advice.

[3] Section 610 does not require a showing that a corporate defendant act "willfully." Accordingly, it could not assert an advice-of-counsel defense. *United States* v. *Bristol*, 473 F.2d 439, 443 (C.A. 5).

[4] Although senior bank officials testified that the salary increases were unconditional, none of the participating officers was so advised (A. 2281, 2283). ("A." designates the appendix in the court of appeals.)

[5] The petition argued that the district court should instruct the jury that, even if it accepted the advice-of-counsel defense, the defendants could still be found guilty of a non-willful violation of Section 610, a misdemeanor. The petition for a writ of mandamus was denied with the following brief statement (A. 57):

> Although at first blush it would appear that it would not be inappropriate for the District Court to give the charge requested by the Government, mandamus is not an appropriate procedure in this case.

charged the jury that it was an essential element of the offense "[t]hat the contribution charged in the specific count was actually made with bank funds" (A. 2825-2826). Since respondent's program involved the indirect use of bank funds, this instruction amounted to a direction to the jury to acquit the defendants, which it did.

The court of appeals dismissed the government's appeal, holding that the Double Jeopardy Clause applies to corporations in the same way as to natural persons, and that it therefore would bar a second trial of respondent. The government conceded that the Double Jeopardy Clause bars review of the acquittals of the individual defendants,[6] and the court of appeals saw "no valid reason why a corporation which is a 'person' entitled to both equal protection and due process under the Constitution * * * should not also be entitled to the constitutional guaranty against double jeopardy" (App. A, *infra*, p. 5a). The court believed that "[n]o corporation, no matter how large, can pit its resources against the overwhelming might of the State so as to avoid the harassment and the increasing probability of convic-

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[6] The government did not seek appellate review of those acquittals.

tion resulting from reprosecutions" (*id.* at 7a). Therefore, it concluded, " 'fundamental fairness' requires that the government, having had a full try at establishing criminal wrongdoing, shall not have another" (*ibid.*).

REASONS FOR GRANTING THE PETITION

This case presents an important but unresolved question of constitutional law: whether the Double Jeopardy Clause applies to corporations so as to create a rule of finality broader than ordinary principles of *res judicata* and collateral estoppel. Although the issue here arises in the context of an appeal by the United States after a jury verdict of acquittal, the issue can arise whenever a criminal trial of a corporation is terminated under circumstances where the Double Jeopardy Clause would bar a retrial of a natural person.

This case began as an action to enforce a significant congressional plan to keep elections free of the influence of corporate contributions. Cf. *Buckley* v. *Valeo*, 424 U.S. 1. It was aborted by what we believe was a patently erroneous charge to the jury.[7]

[7] 18 U.S.C. 610, by its terms, defines a contribution as including any "direct or indirect payment." The scheme involved in this case was a prototypical indirect payment ruse; the bank gave money to the officers, and the officers gave money to candidates. But for the officers' promise to make political contributions, the bank would not have increased their salaries. The program carried out by respondent therefore fails the most elementary test of true independence of contributions and expenditures—"[t]he absence of prearrangement and coordination" (*Buckley* v. *Valeo*, *supra*, 424 U.S. at 47).

Although the acquittal of the individual defendants is final, we submit that the district court's error can be corrected with respect to respondent, a corporation, just as if the judge had given an erroneous jury instruction in a civil case involving the collection of money penalties.

1. We seek the correction of a jury verdict acquitting a corporation in a criminal case. The Double Jeopardy Clause would bar such review of the acquittal of an individual.[8] The central issue requiring resolution therefore is whether differences between corporations and natural persons justify different treatment under the Double Jeopardy Clause.[9]

The question whether the differences between corporations and natural persons call for different principles of finality in criminal prosecutions is important and unsettled. Although the Court decided 71 years ago that the Self-Incrimination Clause does not apply to corporations,[10] it has never considered whether or to what extent the Double Jeopardy Clause applies to corporations. This problem now requires resolu-

[8] *Kepner* v. *United States*, 195 U.S. 100; *United States* v. *Jenkins*, 420 U.S. 358, 369; *United States* v. *Wilson*, 420 U.S. 332, 351-352.

[9] An appeal by the United States from a judgment terminating a criminal prosecution is authorized by 18 U.S.C. 3731 unless further proceedings are barred by the Double Jeopardy Clause. *United States* v. *Wilson*, *supra*, 420 U.S. at 337-339.

[10] *Hale* v. *Henkel*, 201 U.S. 43, 74-75. See also *Wilson* v. *United States*, 221 U.S. 361.

tion, for it controls the conduct of litigation under a multitude of statutes running the gamut of federal regulation of business affairs. The antitrust laws [11] and laws concerning the environment [12] are but two examples of regulatory provisions containing criminal sanctions. Approximately 90 percent of the criminal convictions involving corporations grow out of violations of regulatory statutes.[13]

The decision of the court of appeals makes the enforcement of these public welfare measures both more difficult and less uniform, giving incorporeal abstractions the benefit of a rule that errors in their favor are unreviewable, although errors in the government's favor remain reviewable on appeal. As a result, identically situated corporations may receive different treatment, depending on the judge

[11] See Sections 1 and 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. (Supp. V) 1 and 2.

[12] See 15 U.S.C. 2614 and 2615(b) (toxic substances); 33 U.S.C. 403 and 407 (rivers and harbors protection); 33 U.S.C. (Supp. V) 1311 and 1319 (water pollution); 42 U.S.C. (Supp. V) 4901 *et seq.* (noise).

[13] Administrative Office of the U.S. Courts, *Federal Offenders in United States District Courts* 62 (1971) (527 of 591 convictions of corporations were for regulatory offenses); Administrative Office of the U.S. Courts, *Federal Offenders in the United States District Courts* Table 5, p. 31 (1972) (559 of 637 convictions of corporations were for "other special offenses," a category synonymous with regulatory offenses in the 1971 data); Administrative Office of the U.S. Courts, *Federal Offenders in the United States District Courts* Table 5, p. 31 (1973) (445 of 498 convictions of corporations were for "other special offenses").

who tries the case. Moreover, many of these business regulatory statutes are complex and raise sophisticated legal issues in their application; judicial resolution of problems and uncertainties in the law is hindered by lack of access to appellate consideration of disputed questions. All of this undermines the ability of the criminal justice system effectively to carry out the task of enforcing compliance with the law.

2. We submit that neither the history nor the purposes of the Double Jeopardy Clause support a rule that errors during trial in favor of a corporate defendant should be immune from appellate scrutiny. To the contrary, because a criminal case exposes a corporation to no sanction other than a money judgment, jury verdicts involving corporations should be open to the same appellate scrutiny as those in civil cases.

a. The Framers of the Bill of Rights were not concerned about the rights of corporations in criminal cases. At common law a corporation was deemed incapable of committing a crime.[14] The Framers were concerned primarily with "protecting individual civil liberties" (*United States* v. *White*, 322 U.S. 694, 700), and it has long been settled that the "liberty" protected by the Fifth Amendment "is the liberty of natural, not artificial, persons" (*Western Turf Association* v. *Greenberg*, 204 U.S. 359, 363). If the meaning of the Double Jeopardy Clause were

[14] See 1 Blackstone, *Commentaries* *476 (1872); *New York Central & Hudson River R.R.* v. *United States*, 212 U.S. 481, 492.

fixed by history, therefore, it would not apply to corporations.

b. The language and purposes of the Clause also demonstrate that it should not apply to corporations. Corporations differ from natural persons in several important respects that are highly pertinent to this inquiry. Corporations, unlike natural persons, cannot be imprisoned. Corporations, unlike natural persons, have no emotions. Because of these differences, corporations can be afforded adequate protection by conventional principles of *res judicata* and collateral estoppel and do not need the special rules of finality that the Double Jeopardy Clause extends to natural persons.

The Double Jeopardy Clause erects a safeguard against multiple convictions for the same crime. Principles of *res judicata* do the same,[15] and the present case presents no problem concerning exposure to multiple punishments. The question, rather, is whether respondent may be exposed to a second trial at which the jury will decide its guilt on the basis of correct instructions on the law.

The considerations supporting the prohibition against multiple trials of individuals for the same offense were discussed in *Green* v. *United States*, 355 U.S. 184, 187-188, which observed that "[t]he underlying idea * * * is that the State with all its resources and power should not be allowed to make repeated

[15] *United States* v. *Oppenheimer*, 242 U.S. 85, 88; *Sealfon* v. *United States*, 332 U.S. 575; *Cromwell* v. *County of Sac*, 94 U.S. 351, 352-353.

attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." [16] See also *Breed* v. *Jones*, 421 U.S. 519. Corporations, however, experience no "embarrassment"; they are insensate and feel no "anxiety" or "insecurity." Thus, few of the concerns central to the prohibition against multiple trials apply to corporations.

Corporations doubtless would incur additional expenses and suffer the enhanced possibilities of conviction associated with second trials. But in this regard civil and criminal cases are identical. Civil cases routinely are retried when the instructions to the jury are prejudicially erroneous. Criminal cases should not be treated differently merely because they are denominated "criminal." The only punishment facing a corporation if it is convicted in a criminal case is an order to pay money, the same fate it faces if it loses in a civil case; yet second trials are held in civil cases when the instructions to the jury are erroneous. *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243. The Court has repeatedly held that labels do not control the meaning of the Double

[16] The bar against repetitious trials is not absolute. See *United States* v. *Dinitz*, 424 U.S. 600, and the discussion at pages 12-19 of our brief in *United States* v. *Martin Linen Supply Co.*, certiorari granted, November 1, 1976 (No. 76-120). We are furnishing to counsel for respondent our brief in *Martin Linen*.

Jeopardy Clause.[17] Insofar as corporations are concerned, the difference between civil and criminal cases is primarily one of label [18]—whatever the label, it is exposed to a money judgment but not to imprisonment.[19]

The fact that the corporation faces only an order to pay money has special importance because the Double Jeopardy Clause is framed in terms of jeopardy of "life or limb." Although the Court has interpreted this phrase to include all imprisonment,[20] that interpretation still does not reach corporations, which cannot be imprisoned.

The Court has recognized that there is a fundamental difference, for many purposes, between imprisonment and all other punishments. The Sixth Amendment confers a right to counsel only when the

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[17] See *United States* v. *Sisson*, 399 U.S. 267, 270; *United States* v. *Wilson*, *supra*, 420 U.S. at 335-339, 347-351; *Serfass* v. *United States*, 420 U.S. 377, 392.

[18] The use of the label "criminal" rather than "civil" does not in itself have a damning effect. Many "criminal" prosecutions are essentially regulatory in nature and do not expose the corporation to public obloquy; on the other hand, a civil suit charging a corporation with selling botulism-contaminated vichyssoise would have a catastrophic effect on business. It is the nature of the accusation, not the civil or criminal label, that determines the effect on the corporation.

[19] Indeed, the equivalent of capital punishment for corporations—revocation of the corporate charter—is civil in nature because it involves only the revocation of a license. *Helvering* v. *Mitchell*, 303 U.S. 391, 399.

[20] *Ex parte Lange*, 18 Wall. 163; *Breed* v. *Jones*, *supra*, 421 U.S. at 528.

accused is exposed to imprisonment (*Argersinger* v. *Hamlin*, 407 U.S. 25); the Sixth Amendment right to jury trial also depends upon the seriousness of the punishment, and "[f]rom the standpoint of determining the seriousness of the risk and the extent of the possible deprivation faced by a [defendant], imprisonment and fines are intrinsically different" (*Muniz* v. *Hoffman*, 422 U.S. 454, 477). The potential exposure to imprisonment is the primary source of the "anxiety" and "insecurity" experienced by natural persons in criminal cases; take away the possibility of imprisonment, and a criminal prosecution is little different (insofar as the interests protected by the Double Jeopardy Clause are concerned) from many civil cases.[21]

c. The differences between corporations and natural persons account for the fact that the Self-Incrimination Clause of the Fifth Amendment does not apply to corporations. *Hale* v. *Henkel*, 201 U.S.

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[21] Individuals may suffer collateral consequences of criminal convictions, such as deportation, loss of the right to vote, and inability to possess a firearm. But corporations are not deported, do not vote, and do not carry weapons. The collateral consequences of criminal convictions by and large do not pertain to corporations. Congress might attach some collateral consequences (such as debarment from government contracts) to criminal convictions of corporations, but it also provides for such consequences in civil proceedings. If the collateral consequences of a conviction are not inherently "criminal", then the fact that there may be such consequences does not call the Double Jeopardy Clause into play.

43, 74-75.[22] Moreover, corporations, although protected by the Fourth Amendment (*G. M. Leasing Corp.* v. *United States*, No. 75-235, decided January 12, 1977), are not entitled to the same protection of privacy as natural persons (*United States* v. *Morton Salt Co.*, 338 U.S. 632, 651-652). A corporation is not a "person" entitled to indictment by grand jury. *United States* v. *Macklin*, 389 F. Supp. 272 (E.D. N.Y.), affirmed, 523 F.2d 193 (C.A. 2). And, although it is a "person" entitled to the protection of its "property" under the Due Process Clause of the Fifth Amendment, a corporation has no "life" or "liberty" interests.[23]

A corporation is a legal construct; it is a convenient device for the accumulation and employment of capital, and it bestows limited liability on its shareholders. There is no reason why corporations, cretures of the law rather than of nature, should be endowed with constitutional rights more extensive than necessary to protect their legitimate property interests. We submit that the ordinary principles of *res judicata* are sufficient, in a criminal case, to protect the legitimate interest of corporations in the finality of judgments. See Note, *Double Jeopardy*

[22] A corporation has no privilege against self-incrimination whether it is called on to produce information through agents (as in *Hale*) or in its own name (as in *United States* v. *Kordel*, 397 U.S. 1).

[23] Compare *Wheeling Steel Corp.* v. *Glander*, 337 U.S. 562, with *Western Turf Association* v. *Greenberg*, *supra*, and *Hague* v. *C.I.O.*, 307 U.S. 496.

and Corporations: "Lurking in the Record" and "Ripe for Decision", 28 Stan. L. Rev. 805 (1976).

d. The court of appeals thought that, unless the Double Jeopardy Clause applied to corporations to the same extent that it applies to natural persons, the shareholders of corporations (particularly small or closely held corporations) would be exposed to anxiety, distress, humiliation and expense because of successive prosecutions (App. A, *infra*, pp. 5a-7a). It also expressed concern that the government would use its resources to harass and eventually to overwhelm corporations accused of wrongdoing (*id.* at 7a). The latter concern is not well founded; principles of *res judicata* and collateral estoppel will prevent unjustified relitigation or harassment.[24]

The court's concern for the non-pecuniary interests of the shareholders fares no better, in light of this Court's treatment of the Self-Incrimination Clause of the Fifth Amendment. The cases holding that corporations and partnerships have no privilege against self-incrimination are summarized in *Bellis* v. *United States*, 417 U.S. 85. The Court recognized in *Bellis*

[24] We ask no more than "that the case against [respondent] shall go on until there shall be a trial free from the corrosion of substantial legal error. * * * This is not cruelty at all, nor even vexation in any immoderate degree. If the trial had been infected with error adverse to the accused, there might have been review at his instance, and as often as necessary to purge the vicious taint. A reciprocal privilege * * * granted to the state * * * [is] no seismic innovation. The edifice of justice stands, its symmetry, to many, greater than before." *Palko* v. *Connecticut*, 302 U.S. 319, 328.

that denying the privilege to a partnership or corporation often has the practical effect of denying the privilege of a natural person; a corporation may be the alter ego of a person, and to compel a person to produce the records of a corporation may be to compel him to produce records that will incriminate himself.

Nevertheless, the Court has rejected the argument that the needs and privileges of natural persons may be conferred upon corporations merely because they are associated in business. A person seeking to do business as a corporation must take the bitter with the sweet; just as the corporation's debts cannot be attributed to him, so his human emotions and concerns cannot be attributed to the corporation. Indeed, as the foregoing discussion suggests, there are even stronger reasons for concluding that the Double Jeopardy Clause does not apply to corporations than there are for the like conclusion regarding the Self-Incrimination Clause.

3. The court of appeals, in addition to deciding the merits of the double jeopardy question, stated (App. A, *infra*, pp. 2a-4a) that independent consideration of the question is foreclosed by *Fong Foo* v. *United States*, 369 U.S. 141. *Fong Foo* upheld a double jeopardy claim presented by two natural persons and one corporation. The court of appeals concluded that the Court's failure to distinguish in *Fong Foo* between the corporation and the natural persons amounted to a holding that there is no constitutional difference in the application of the Double Jeopardy Clause. We disagree.

Fong Foo did not discuss the application of the Double Jeopardy Clause to corporations. The issue was not presented as a question for the Court's consideration, and it was not briefed by the parties.[25] The Court did not mention the issue, even in passing. The Court's failure in *Fong Foo* to consider an issue that was not presented by the parties cannot be considered an adjudication of the issue. See *Stone* v. *Powell*, No. 74-1055, decided July 6, 1976, slip op. 12-14 and nn. 14, 15; *Nashville Milk Co.* v. *Carnation Co.*, 355 U.S. 373, 376 n. 5 (opinion of the Court), 383 (Douglas, J., dissenting). Cf. *Edelman* v. *Jordan*, 415 U.S. 651, 670-672.

Regrettably, however, the lower courts either feel bound by the implication of *Fong Foo*[26] or assume, without discussion, that the double jeopardy principles applying to natural persons apply equally to

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[25] The corporate petitioner mentioned the issue only obliquely, in a footnote asserting that it was a "person" within the meaning of the Double Jeopardy Clause. Brief for Standard Coil Products Co., p. 52 n. *, October Term, 1961, No. 65. The United States did not challenge that statement or raise the issue for the Court's consideration in light of its argument that the district court's "acquittal" was a nullity and that the defendants were subject to a single continuing "jeopardy" after the court of appeals issued its writ of mandamus. See Brief for the United States, pp. 25, 47.

[26] See, in addition to the decision below, *United States* v. *Southern Ry.*, 485 F.2d 309 (C.A. 4). See also *United States* v. *Armco Steel Corp.*, 252 F. Supp. 364 (S.D. Cal.).

corporations.[27] There is therefore little prospect of a conflict arising among the circuits until, at a minimum, this Court makes it clear that *Fong Foo* has not foreclosed consideration of the extent to which the Double Jeopardy Clause applies to corporations.

In light of these circumstances, and since this is a fundamental constitutional issue of manifest importance that plainly is suitable for resolution by this Court, there is no reason for this Court to await further consideration of the issue in the lower courts. That course would produce unnecessary litigation in courts that evidently do not feel free to consider the question. More importantly, the fundamental nature of the question is such that its further exploration by the lower courts is unlikely either to assist the Court in deciding it or to obviate the need for that decision.

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[27] See, *e.g.*, *United States* v. *Martin Linen Supply Co.*, 534 F.2d 585 (C.A. 5), certiorari granted, November 1, 1976 (No. 76-120) (we have not presented the issue in *Martin Linen* because it was not briefed in the court of appeals or explicitly considered by that court).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1977.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 282—September Term, 1976

(Argued September 27, 1976
Decided December 6, 1976)

Docket No. 76-1283

UNITED STATES OF AMERICA, APPELLANT

v.

SECURITY NATIONAL BANK, DEFENDANT-APPELLEE

Before:

WATERMAN, VAN GRAAFEILAND, *Circuit Judges*,
MOTLEY, *District Judge**

VAN GRAAFEILAND, *Circuit Judge*:

On September 5, 1975, a grand jury sitting in the Eastern District of New York indicted Security National Bank on 9 counts of making unlawful political

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* Of the Southern District of New York, sitting by designation.

contributions in violation of 18 U.S.C. § 610. Three of the bank's officers were charged with conspiring to cause the bank to make these unlawful contributions. These same officers were also charged with conspiracy to misapply bank funds in violation of 18 U.S.C. § 656, and one of them was charged with making false statements in violation of 18 U.S.C. § 1001. Following a ten-week trial before Judge Costantino and a jury, verdicts of not guilty were returned as to all charges except one substantive count against an individual defendant. The Government now appeals from the judgment acquitting the corporate defendant, contending that it resulted from erroneous instructions given to the jury by the trial judge. Because we conclude that an appeal cannot be taken from this judgment of acquittal, we do not reach the merits of the Government's contention.

In *United States* v. *Jenkins*, 490 F.2d 868 (2d Cir. 1973), *aff'd*, 420 U.S. 358 (1975), we held that, despite the 1970 amendment to the Criminal Appeals Act, 18 U.S.C. § 3731, when a defendant has been acquitted after a trial on the merits, the double jeopardy clause of the Constitution precludes appeal by the Government. This, of course, was the well-established rule prior to the amendment. *See United States* v. *Wilson*, 420 U.S. 332, 352 (1975); *Fong Foo* v. *United States*, 369 U.S. 141 (1962); *Kepner* v. *United States*, 195 U.S. 100 (1904). Conceding, as it must, that it is barred from appealing judgments acquitting individual defendants, the Government now contends that a corporate defendant should

not be entitled to the same double jeopardy protection.

This argument is advanced without citation of supporting authority and in the face of substantial authority to the contrary. In *Fong Foo* v. *United States*, *supra*, 369 U.S. at 143, the Court held that the Court of Appeals erred in setting aside a judgment acquitting a corporate defendant, stating that the double jeopardy provision of the Constitution was "at the very root" of the case and that its guaranty had been violated. Lower court decisions are in unanimous accord. *See, e.g., United States* v. *Martin Linen Supply Co.*, 534 F.2d 585 (5th Cir.), *cert. granted*, 45 U.S.L.W. 3329 (Nov. 1, 1976); *United States* v. *Southern Ry.*, 485 F.2d 309, 312 (4th Cir. 1973); *United States* v. *Armco Steel Corp.*, 252 F. Supp. 364, 368 (S.D.Cal. 1966); *City of Englewood* v. *George M. Brewster & Son, Inc.*, 77 N.J. Super. 248 (1962). In other cases, such as *Rex Trailer Co., Inc.* v. *United States*, 350 U.S. 148 (1956) and *American Tobacco Co.* v. *United States*, 328 U.S. 781 (1946), the Supreme Court has assumed a corporate right to double jeopardy protection by considering claims for such protection on the merits "a quite improper procedure", according to Mr. Justice Jackson, "if the corporation had no standing to raise the constitutional questions." *Wheeling Steel Corp.* v. *Glander*, 337 U.S. 562, 575 (1949).

Because we are not empowered to overrule Supreme Court decisions, *Bank of New York* v. *Helvering*, 132 F.2d 773, 775 (2d Cir. 1943), the Government seeks

to minimize the precedential authority of *Fong Foo*, contending that the question of the applicability of the double jeopardy doctrine to corporations was not specifically considered by the Court in that case. Reference to the petitioner's brief in *Fong Foo* discloses, however, that this precise issue was raised and briefed. At most, there was a failure by the Court to set forth the reasons why it adopted petitioner's position.

Even if we were to accept the authority which the Government so graciously concedes us, we are presented with no persuasive reasons for exercising it. The Government's technical argument that the Constitution precludes double jeopardy only of "life and limb" was rejected by the Supreme Court many years ago. *See Breed* v. *Jones*, 421 U.S. 519, 528 (1975). Applied literally, this clause would preclude a defendant being placed twice in jeopardy only for capital felonies, and some early cases so held. *See, e.g., People* v. *Goodwin*, 18 Johns. 187, 201 (N.Y.Sup.Ct. 1820); *United States* v. *Gilbert*, 2 Sumner 19, 45 (1st Cir. 1834). However, in *Ex parte Lange*, 85 U.S. 163 (1873), the Supreme Court, recognizing that this constitutional provision was merely an embodiment of common law principles, held that it applied to misdemeanors as well. Although most state constitutions also contain double jeopardy provisions, their phraseology differs from state to state, proscribing double jeopardy "for the same offense", "of life or limb", "of life or liberty", "of punishment", et cetera. *Index Digest of State Constitutions*, 576

(1959). Despite the differences in language, it is generally held that these clauses mean substantially the same thing, *State* v. *Wolf*, 46 N.J. 301 (1966); *Gomez* v. *Superior Court*, 50 Cal. 2d 640, 649 (1958); *Stout* v. *State ex rel. Caldwell*, 36 Okla. 744 (1913); *i.e.*, that one may not be tried a second time for the same offense. *Calvaresi* v. *United States*, 216 F.2d 891, 902 (10th Cir. 1954), *rev'd on other grounds*, 348 U.S. 961 (1955).

The prohibition against double jeopardy, "one of the oldest ideas found in western civilization", *Bartkus* v. *Illinois*, 359 U.S. 121, 151 (1959) (Black, *J.* dissenting), has become "part of our American concept of fundamental fairness." *Brock* v. *North Carolina*, 344 U.S. 424, 435 (1953) (Vinson, *C.J.* dissenting). It represents such a "fundamental ideal in our constitutional heritage" that its basic core must be included within the equally fundamental constitutional right of due process. *Benton* v. *Maryland*, 395 U.S. 784, 794 (1969); *see also United States* v. *Wilkins*, 348 F.2d 844, 854 (2d Cir. 1965), *cert. denied*, 383 U.S. 913 (1966). We see no valid reason why a corporation which is a "person" entitled to both equal protection and due process under the Constitution, *Wheeling Steel Corp.* v. *Glander*, *supra*, 337 U.S. at 574, should not also be entitled to the constitutional guaranty against double jeopardy.

The Government argues its cause as if all corporations were industrial giants and all corporate crimes were merely regulatory violations punishable by mod-

est fines. Thus, it seeks to avoid the concept of governmental harassment and oppression which is a basic ingredient of the resistance to double jeopardy. *See Abbate* v. *United States*, 359 U.S. 187, 189 (1959). Neither corporations nor corporate crimes can be so easily encapsulated. Most New York business corporations, for example, have only a few shareholders, and some have only one. G. Hornstein, *Analysis of Business Corporation Law*, 6 McKinney's Business Corporation Law, Appendix 1 at 454. Moreover, many corporations are organized for religious, educational, charitable or social purposes, rather than for the pursuit of profit. It is well-settled, also, that a corporate entity may be guilty of a great variety of criminal acts. *See* 10 Fletcher Cyc. Corp. (Perm. Ed.) Chapter 55, § 4951, at 478-83. Indeed, some commentators assert, perhaps a bit enthusiastically, that there is virtually no crime for which a corporation should not be held liable. *See, e.g.*, 3 H. Oleck, Modern Corporation Law § 1681, at 727 (1959). The financial penalties for some of these offenses can be substantial indeed. *See, e.g., Standard Oil Co. of Indiana* v. *United States*, 164 F. 376 (7th Cir. 1908), *cert. denied*, 212 U.S. 579 (1909); *United States* v. *Bernstein*, 533 F.2d 775, 809 (2d Cir. 1976) (Van Graafeiland, *J.*, dissenting). Bearing these factors in mind, we are not prepared to accept the Government's contention that "but for the label [a criminal proceeding against a corporation] is little different from a civil case." Government's reply brief at 18.

The small entrepreneur is not spared the embar-

rassment, expense, anxiety and insecurity resulting from repeated trials on criminal charges, simply because he has incorporated his modest business That a large corporation may have more substantial financial resources is no more valid ground for depriving it of its constitutional rights than is the possession of greater wealth by an individual. Indeed, the larger the corporation, the more likely it is that its shareholders, who in the end must bear the financial burden consequent upon criminal liability, will be completely innocent and unaware of any corporate wrongdoing.

No corporation, large or small, can escape the "incalcuable effect" which a conviction may have on the public attitude toward the company. 3 H. Oleck, *supra*, § 1683, at 729 like an individual, it must answer to the "verdict of the community". *Price* v. *Georgia*, 398 U.S. 323, 331 n.10 (1970). No corporation, no matter how large, can pit its resources against the overwhelming might of the State so as to avoid the harassment and the increasing probability of conviction resulting from reprosecutions. *Cf. United States* v. *U. S. Gypsum Co.*, 404 F.Supp. 619, 621 (D.D.C. 1975). In this unequal contest, "fundamental fairness" requires that the government, having had a full try at establishing criminal wrongdoing, shall not have another.

The appeal is dismissed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of December, one thousand nine hundred and seventy-six.

Present: Hon. Sterry R. Waterman
Hon. Ellsworth A. VanGraafeiland
Circuit Judges
Hon. Constance Baker Motley
District Judge

76-1283

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

PATRICK J. CLIFFORD, DAVID J. DOWD, FRANK B. POWELL, AND THE SECURITY NATIONAL BANK, DEFENDANTS

SECURITY NATIONAL BANK, DEFENDANT-APPELLEE

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for

the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now ordered, adjudged, and decreed that the appeal from the judgment of said District Court be and it hereby is dismissed in accordance with the opinion of this court.

A. DANIEL FUSARO
Clerk

by Vincent A. Carlin
Chief Deputy Clerk

☆ U. S. GOVERNMENT PRINTING OFFICE: 1977 227705 81

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1077

UNITED STATES OF AMERICA,

Petitioner,

v.

SECURITY NATIONAL BANK,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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March 9, 1977

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BRIEF FOR RESPONDENT IN OPPOSITION

Opinion Below

The opinion of the Court of Appeals (Petition, Appendix A) is reported at 546 F.2d 492.

Statement

On September 5, 1975, respondent was indicted in the United States District Court for the Eastern District of New York and charged in nine counts with making illegal political contributions in violation of 18 U.S.C. §610. Three

of respondent's officers were also indicted. They were charged with conspiring to cause respondent to make the allegedly unlawful contributions, in violation of 18 U.S.C. §371; with causing respondent to make the contributions, in violation of 18 U.S.C. §610; and with conspiring to misapply bank funds, in violation of 18 U.S.C. §656. One officer was also indicted on two counts for allegedly making false statements in violation of 18 U.S.C. §1001.

At the trial, before a judge sitting with a jury, the government sought to prove that respondent made indirect contributions by raising the salaries of certain of its officers by $1700 per year and then directing the officers to make political contributions of $100 per month. The individual defendants defended against these charges on the ground that they acted in good faith reliance on the advice of respondent's counsel that the contributions program was legal.

Respondent defended on the ground that the officers were not merely conduits, but were free to use their salary increases as they saw fit without fear of reprisal. In support of this position, respondent elicited testimony which showed that several officers stopped making contributions and used the salary increases for their own purposes (A. 1019-1020, 1248-1249, 2772-2776);* that several officers considered the money to be their own (A. 1454, 1562, 1605, 1991, 2776-2779); and that several officers contributed only to political organizations which were politically acceptable to them (A. 373, 582, 958-959, 2774-2775). In addition, respondent contended that the contributions program was voluntary in nature (e.g., A. 1614, 1983, 2784-2785), no individual was forced to contribute, and no person who refused to participate was ever penalized in any way (A. 1247-1248, 1580-1581, 2785-2786). Finally, at respondent's request, the court charged the jury that it could not find respondent guilty if it concluded that the officers responsible for the contributions program were acting outside the scope of their authority (A. 2838-2840; BA 354-356).

* "A." refers to the appendix in the Court of Appeals; "BA" refers to the respondent's appendix in the Court of Appeals; "Pet." and "Pet. App." refer to the petition for a writ of certiorari and the appendices attached thereto.

In that portion of the charge to the jury which the government describes as "patently erroneous" (Pet. 6), the Court instructed that it was an essential element of the offense under section 610 "[t]hat the contribution charged in the specific count was actually made with bank funds" (A. 2825-2826). The government not only failed to object to this wording, but specifically requested the language now complained of. In its Requests to Charge, the government submitted a proposed instruction which stated: "Second, that bank money was used to make the political contribution or expenditure of money in connection with an election" (Government's Requests to Charge, Request No. 4; BA 357). Subsequently, in the colloquy during which the specific wording of the charge was debated, the defendants suggested that it read "actually made by the bank" (A. 2756-2757). The government replied, "[r]ather than by the bank, using bank funds as a much more accurate phrase" (A. 2757).*

* The government's statement that the instruction "amounted to a direction to the jury to acquit the defendants" (Pet. 5) is simply frivolous. The court also charged that "a contribution includes both direct and indirect payments" (A. 2826) and recapitulated the government's theory of the case, ". . . that the bank made the contributions indirectly by giving certain of its officers salary increases which

(footnote continued on next page)

The petition implies that the government filed its mid-trial petition for mandamus to correct the alleged error which it raised on appeal and renews here (Pet. 4). This is misleading. The ruling which prompted the mandamus petition related to the individual defendants rather than respondent, it did not involve the final charge to the jury (in which the government fully acquiesced in any event), and it was only partially based on the trial judge's view of the substantive elements required by Section 610*

The jury acquitted respondent on all counts.** The Court of Appeals dismissed the government's appeal as barred by the Double Jeopardy Clause.

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would then be used to make contributions on behalf of the bank" (A. 2826). In this connection, the court adverted to the government's contention that the officers of the bank were "merely conduits for the bank's money" (A. 2827). The single instruction on which the government focuses must be viewed in this overall context. *United States* v. *Park*, 421 U.S. 658, 674-675 (1975); *Cupp* v. *Naughton*, 414 U.S. 141, 146-147 (1973).

* In its petition for mandamus (A. 36-56), the government sought to compel the trial judge to charge the jury that the individual defendants could be convicted of a non-wilful misdemeanor violation of Section 610 even if their advice of counsel defense were accepted. The trial judge had refused to charge the elements of the misdemeanor violation for two reasons. First, he concluded that if the jury accepted the individual defendants' contention that they had relied on counsel's advice that the salary raises became the officer's property, then the jury would have to acquit them not only of the felony charge, but of a misdemeanor charge as well, since it could not be established that the defendants *knowingly* caused contributions of bank money (A. 2754). Second, he found that the timing of the government's request for the misdemeanor charge, which came several weeks after requests were to be filed and after the defendants had taken the stand and testified concerning their involvement in the contributions program, created extreme prejudice (A. 2755).

** The jury also acquitted two of the individual defendants on all counts. The third individual defendant was acquitted on all but one count, a violation of 18 U.S.C. §1001. His conviction on this count was subsequently set aside by the trial judge. *United States* v. *Clifford*, 75-CR-654 (E.D.N.Y. October 21, 1976).

Argument

In dismissing the government's appeal, the court below held that the Double Jeopardy Clause applies to corporations, and that when a defendant, whether an individual or a corporation, has been acquitted after a trial on the merits, "the double jeopardy clause of the Constitution precludes appeal by the government" (Pet. App. A, 2a-3a). This reading of the scope of the Clause is entirely consistent with and indeed mandated by this Court's decision in *Fong Foo* v. *United States*, 369 U.S. 141 (1962). Moreover, the unanimous decision of the Second Circuit here in issue is in complete accord with the view taken by every federal court which has considered double jeopardy claims raised by corporate defendants. Indeed, the decision recognizing the standing of the corporate defendant to invoke the protection of the Double Jeopardy Clause is compelled by the policy considerations underlying the Clause.

1. The Court of Appeals held that the applicability of the Double Jeopardy Clause to the corporate defendant was resolved by this Court in *Fong Foo* v. *United States*, *supra*. In *Fong Foo*, the Court held that the Double Jeopardy Clause was violated when the First Circuit vacated the trial court's mid-trial order acquitting the corporate defendant and two of its employees and ordered a new trial. The Court held that the verdict of acquittal was final and could not be reviewed on appeal without placing the defendants, corporate and individual, twice in jeopardy in violation of the Constitution. The government maintains that *Fong Foo* is not dispositive, arguing that the

decision cannot be considered an adjudication of the issue presented here since the issue was not explicitly presented, briefed or discussed (Pet. 16-18).

On the contrary, the issue was squarely presented for resolution in *Fong Foo*. The first question presented in the petition of the corporate defendant was "[w]hether the double jeopardy clause . . . bars a new trial of the defendant for the same alleged federal crime after a judgment of acquittal has been entered in the previous trial . . . ."* We submit that when a claim to constitutional protection is raised in this manner by a petitioner, his standing to assert the particular constitutional right in question is necessarily an issue before the Court. See *Wheeling Steel Corp.* v. *Glander*, 337 U.S. 562, 575 (1949); Sup. Ct. Rule 23(1)(c). Moreover, in *Fong Foo* the corporate petitioner explicitly argued that it was a "person" within the meaning of the Double Jeopardy Clause, stating that:

> "Petitioner corporation is a 'person' entitled to the Constitutional safeguard under the Fifth Amendment against being 'twice put in jeopardy.' *United States* v. *Glidden Co.*, 78 F.2d 639 (6th Cir. 1935; *United States* v. *United States Industrial Alcohol Co.*, 15 F. Supp. 784 (D.C. Md. 1936), *rev'd on other grounds*, 103 F.2d 97 (4th Cir. 1939). *See also United States* v. *M'Hie*, 194 Fed. 894, 898 (N.D. Ill. 1912). This is the only reasonable construction of the double jeopardy provision of the Fifth Amendment since its rationale 'that the State with all its resources and power should not be allowed to make repeated attempts

* Petition for a Writ of Certiorari at 2, *Standard Coil Products Co.* v. *United States* (decided with *Fong Foo* v. *United States*), 369 U.S. 141 (1962) (BA 303, 307).

> to convict,' *Green* v. *United States*, 355 U.S. 184, 187 (1957), or to impose successive punitive sanctions, is as applicable to a corporation as to an individual.'"*

The government's characterization of this statement as an oblique reference to the issue presented here (Pet. 17 n. 25) is puzzling. It is difficult to see how the corporate petitioner could have delineated more clearly its asserted eligibility for double jeopardy protection. In its Brief in *Fong Foo* the government, far from challenging the statement set forth above, conceded that the corporation had been placed in jeopardy.**

While we would not suggest that the government's decision to concede an issue before this Court forecloses that issue against the government forever, neither are we aware of any principle of constitutional adjudication which mechanically restricts the reach of a particular holding of this Court to those issues which the government, or any other litigant, in its discretion chooses to actively contest. When, as in *Fong Foo*, the disputed issue has been presented and briefed by the petitioner, conceded by the respondent, and necessarily decided as a predicate to a holding on the merits, the only logical view is that the issue has been decided.

In addition to the Court of Appeals in the decision below, the Fourth Circuit has read *Fong Foo* as holding that a corporation is entitled to double jeopardy protection.

* Brief for Standard Coil Products Co., Inc. at 52 n., *Standard Coil Products Co.* v. *United States* (decided with *Fong Foo* v. *United States*), 369 U.S. 141 (1962) (BA 310, 321).

** Brief for the United States at 46-47, *Standard Coil Products Co.* v. *United States* (decided with *Fong Foo* v. *United States*), 369 U.S. 141 (1962) (BA 334, 341-342).

United States v. *Southern Railway Corp.*, 485 F.2d 309, 312 (1973). See also *United States* v. *Armco Steel Corp.*, 252 F.Supp. 364, 368 (S.D. Cal. 1964). Moreover, when *Fong Foo* is read against a background of earlier decisions of this Court in which a corporate right to double jeopardy protection is assumed, see, *e.g.*, *Rex Trailer Co.* v. *United States*, 350 U.S. 148 (1956), *American Tobacco Co.* v. *United States*, 328 U.S. 781 (1946), *Puerto Rico* v. *Shell Co.*, 302 U.S. 253 (1937), there is scant basis for the government's contention that the question presented here remains unresolved. Thus, it is hardly surprising that the government candidly concedes that as long as *Fong Foo* remains the last word on the subject, there is little prospect of a conflict arising among the circuits (Pet. 17-18).* Given the present state of the law, there is no need for this

* As the Court of Appeals observed in the decision below, "lower court decisions are in unanimous accord" (Pet. App. A, 3a) with the view that the established rules of double jeopardy protection do apply to the corporate defendant. See, *e.g.*, *United States* v. *Martin Linen Supply Co.*, 534 F.2d 585 (5th Cir. 1976), *cert. granted*, Nov. 1, 1976 (No. 76-120); *United States* v. *Glidden Co.*, 78 F.2d 639 (6th Cir. 1935); *United States* v. *United States Gypsum Co.*, 404 F.Supp. 619 (D.D.C. 1975); *United States* v. *American Honda Motor Co.*, 273 F.Supp. 810 (N.D. Ill. 1967); *United States* v. *American Honda Motor Co.*, 271 F.Supp. 979 (N.D. Cal. 1967); *United States* v. *H.E. Koontz Creamery, Inc.*, 257 F.Supp. 295 (D. Md. 1966). In addition, a number of courts have assumed such protection in considering on the merits double jeopardy claims raised by corporations. See, *e.g.*, *United States* v. *Martin Linen Supply Co.*, 485 F.2d 1143 (5th Cir. 1973), *cert. denied*, 415 U.S. 915 (1974); *United States* v. *Wilshire Oil Co.*, 427 F.2d 969 (10th Cir.), *cert. denied*, 400 U.S. 829 (1970); *United States* v. *American Oil Co.*, 296 F.Supp. 538 (D. N.J.), *cert. denied*, 396 U.S. 845 (1969). At least two state courts have held that a corporation is entitled to double jeopardy protection. *People* v. *Holbrook Transportation Corp.*, —— Misc.2d ——, 389 N.Y.S.2d 514 (App. Term, 1976); *City of Englewood* v. *Geo. M. Brewster & Son*, 77 N.J. Super. 248, 126 A.2d 120 (App. Div. 1962).

Court to amplify the rationale of a settled constitutional rule whose application presents no difficulty to the lower courts.

2. The government contends that since a conviction of a corporation can lead only to a fine, there is no meaningful distinction between a criminal prosecution of a corporation and a civil suit involving a corporation; "the difference between civil and criminal cases is primarily one of label—whatever the label, it is exposed to a money judgment but not to imprisonment" (Pet. 12). Hence, the government argues, it should be entitled to appeal jury verdicts of acquittal as though it were a party to a civil suit against a corporate defendant (Pet. 9). The Court of Appeals properly rejected this argument.

a. The central defect in the government's theory is that its premise is false; the nature of the penalty does not determine the applicability of the Double Jeopardy Clause. Although the Clause by its terms speaks of "jeopardy of life or limb," it is settled that it means something far broader than its literal language. *Breed* v. *Jones*, 421 U.S. 519, 528 (1975). The Court has read the Clause as "written in terms of potential risk of trial and conviction, *not punishment.*" *Price* v. *Georgia*, 398 U.S. 323, 329 (1970) (emphasis supplied).

Criminal prosecutions within the coverage of the Clause are not limited to proceedings which may lead to a penalty of incarceration.* *United States* v. *La Franca*, 282 U.S.

* As the government notes (Pet. 13), the Court in *Muniz* v. *Hoffman*, 422 U.S. 454, 477 (1975), stated that imprisonment and fines are intrinsically different for purposes of the Sixth Amendment jury

(footnote continued on next page)

568 (1931); *United States* v. *Chouteau,* 102 U.S. 603 (1880). See also *Robinson* v. *Neil,* 409 U.S. 505 (1973); *Ex Parte Lange,* 85 U.S. 163 (1873). The test of whether the Clause applies is not the nature of the penalty which may be imposed, whether upon an individual or corporation, but rather the character of the proceeding as remedial or criminal. *Helvering* v. *Mitchell,* 303 U.S. 391, 398-99 (1938). Thus, in actions which cannot lead to incarceration but only to economic sanctions, the Court has determined the applicability of the Clause in light of "the line between civil, remedial actions brought primarily to protect the government from financial loss and actions intended to authorize criminal punishment to vindicate public justice." *United States ex rel. Marcus* v. *Hess,* 317 U.S. 537, 548-49 (1943).

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trial guarantee. However, the Court expressly declined to reach the argument proffered by the government that would have distinguished between individuals and corporations—"that there is no constitutional right to a jury trial in any criminal case where only a fine is imposed on a corporation or labor union." *Id.*

In any event, the government's reliance on the fine-imprisonment distinction drawn in *Muniz* and in *Argersinger* v. *Hamlin,* 407 U.S. 25 (1972), another Sixth Amendment case, as bearing on the scope of the Double Jeopardy Clause, is simply misplaced. In *Breed* v. *Jones,* 421 U.S. 519, 528 n.10 (1975), the Court noted that "[dis]tinctions which in other contexts have proved determinative of the constitutional rights of those charged with offenses against public order have not similarly confined the protection of the Double Jeopardy Clause. Compare *Robinson* v. *Neil,* 409 U.S. 505 (1973), with *Baldwin* v. *New York,* 399 U.S. 66 (1970), and *Argersinger* v. *Hamlin,* 407 U.S. 25 (1972)." The distinction between a fine and imprisonment bears on the right to jury trial under *Baldwin;* it bears on the right to counsel under *Argersinger.* That this distinction does not confine the protection of the Double Jeopardy Clause is manifest in *Robinson,* where the Court held that its decision in *Waller* v. *Florida,* 397 U.S. 387 (1970), barring separate state and municipal prosecutions for the same offense, applied retroactively in a case where the defendant was fined in a municipal court and later jailed upon a state conviction.

The government's argument that the Double Jeopardy Clause should not apply to a corporation because it is only subject to a fine is not only inconsistent with every decision of the Court noted above, it is also logically flawed. The identical argument that the government advances here could be made with respect to the prosecution of individuals under numerous federal criminal statutes which do not provide for a penalty of incarceration. See, *e.g.,* Title 18, United States Code, Sections 154, 243, 244, 288 (claims of less than $100), 291, 431, 432, 475, 489, 616, 1694, 1696(b), 1697 and 1698. We do not understand the government's position to be that it could appeal from a verdict acquitting an individual of a violation of one of these statutes. On the contrary, the government concedes, as it must, that the Double Jeopardy Clause bars a government appeal whenever a natural person is tried and acquitted (Pet. 5, 6, 7). Thus, at least in the case of individuals, the government implicitly concedes that the Double Jeopardy Clause applies to all criminal proceedings, regardless of the penalty which may be imposed.

Nowhere in its petition, however, does the government advance a single reason, much less a logical or compelling one, why the Clause protects an individual who is subject only to a fine, but should not apply to a similarly situated corporate defendant. Indeed, the entire thrust of the government's argument, that a corporation cannot be imprisoned and therefore does not require double jeopardy protection, begs this dispositive question rather than answers it. The government's inability to provide a satisfactory rationale in urging different treatment for similarly

situated corporate and individual defendants is, however, understandable. When the policies underlying the Double Jeopardy Clause are examined, it is evident that just as the application of the Clause does not turn on the nature of the potential penalty, neither does the scope of the Clause depend upon the character of the defendant.

b. One of the central purposes of the Clause is to protect a defendant against multiple prosecutions for the same offense.* *United States* v. *Wilson,* 420 U.S. 332, 343 (1975). This policy against multiple trials is so strong that exceptions to it have been only grudgingly allowed. *Id.* Hence the rule that the government may not appeal an acquittal when appellate review might subject the defendant to a second trial. *United States* v. *Jenkins,* 420 U.S. 358, 365 (1975); *Fong Foo* v. *United States,* 369 U.S. 141 (1962); *Kepner* v. *United States,* 195 U.S. 100 (1904); *United States* v. *Ball,* 163 U.S. 662 (1896).

* The Clause "protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina* v. *Pearce,* 395 U.S. 711, 717 (1969). Given the emphasis in two of these rules upon the prohibition against reprosecution, it is evident that the government reads the Clause far too narrowly when it states that the Clause "erects a safeguard against multiple convictions for the same crime" (Pet. 10). Moreover, the government's further statement that "[p]rinciples of *res judicata* do the same . . . [*i.e.* protect against multiple convictions for the same crime]" (Pet. 10), is simply false. Orthodox principles of *res judicata* and collateral estoppel do not come into play until after a final judgment and would not bar a second conviction for the same offense; indeed, such principles, to the extent applicable, would operate in a second prosecution following conviction to conclude *against* the defendant those issues actually litigated in the first trial. See *Developments in the Law—Res Judicata,* 65 Harv. L. Rev. 818, 875 (1952); *cf. Emich Motors Corp.* v. *General Motors Corp.,* 340 U.S. 558, 568-69 (1951).

The rule against multiple trials furthers fundamental notions of fairness and finality. As Mr. Justice Black stated for the Court in *Green* v. *United States,* 355 U.S. 184, 187-188 (1957):

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

These policies apply fully to the corporate defendant. The risk of prosecutorial abuse, in the form of repeated attempts to obtain a conviction, is precisely the same whether the defendant is a natural or a legal person.* This function of the Clause as a restraint upon unwarranted governmental action does not derive its purpose from the character of the defendant, but reflects a need to "lessen the danger of governmental tyranny." J. Sigler, *Double Jeopardy: The Development of a Legal and Social Policy* 15 (1969). See also *Gori* v. *United States,* 367 U.S. 364, 372 (1961) (dissenting opinion); Note, *Double Jeopardy and the Multiple-Count Indictment,* 57 Yale L.J. 132, 133 (1947). Hence the attachment of jeopardy when the jury is sworn, which "prevents a prosecutor or judge from subjecting a defendant to a second prosecution by discontinu-

* The government does not appear to suggest that the risk of prosecutorial abuse is present to a lesser degree where the defendant is a corporation than where the defendant is a natural person. Indeed, given the government's conduct in the trial below, it would be hard pressed to make such an argument. See Brief for Defendant-Appellee Security National Bank in the decision below at 33 n., 36 n.

ing the trial when it appears that the jury might not convict.'"* *Green* v. *United States,* 355 U.S. 184, 188 (1957). This important function of the Double Jeopardy Clause as a curb on prosecutorial abuse has continuing vitality in every prosecution, whether of an individual or a corporation. *United States* v. *Kessler,* 530 F.2d 1246 (5th Cir. 1976). See *United States* v. *Jorn,* 400 U.S. 470, 485-486 (1971); *Downum* v. *United States,* 372 U.S. 734, 736 (1963).

A second policy underlying the rule against multiple prosecutions is that the possibility of convicting an innocent defendant is thereby minimized. *Green* v. *United States, supra* at 187-188. Clearly this policy applies regardless of the character of the defendant and regardless of the penalty. The wrongful conviction of an innocent corporation, following repeated trials, would be no less reprehensible than the wrongful conviction of an individual defendant.**

The final set of considerations noted by Mr. Justice Black in *Green* v. *United States, supra,* concern the embar-

* Principles of *res judicata* and collateral estoppel would not protect a corporate defendant whose trial had been discontinued by the prosecution against a second trial for the same offense, since by definition there would be no final judgment determining any issue of ultimate fact. See *Ashe* v. *Swenson,* 397 U.S. 436, 443 (1970).

** Nowhere in its petition does the government suggest that the wrongful conviction of a corporation is not equally repugnant to our concept of justice. The government concedes that "[c]orporations doubtless would . . . suffer the enhanced possibilities of conviction associated with second trials" (Pet. 11), but argues that in this respect civil and criminal cases involving corporations are identical, and the government's right to appeal should not depend on the label attached. The short answer to this is that the same argument could be made with respect to individual defendants exposed only to a fine. The government does not (because it cannot) explain why the "label" should be disregarded in the case of corporations but not in the case of individuals.

rassment, expense, ordeal, anxiety and insecurity which would be suffered by a defendant exposed to the possibility of multiple prosecutions for the same offense. In its petition, the government contends that these concerns focus primarily on the potential exposure to imprisonment faced by an individual defendant (Pet. 13). However, since the application of the Double Jeopardy Clause concededly does not require a prospect of imprisonment in a proceeding against an individual, but only that the proceeding be criminal in nature, the government's view is too restrictive. We submit that the guarantee of finality embodied in the Clause serves the broader function of delimiting the ordeal, the expense and the opprobrium visited upon a defendant exposed to a verdict of criminal guilt, irrespective of the particular sanctions which may attend that verdict.

Denial of double jeopardy protection to the corporation would lead to adverse effects closely akin to those enumerated in *Green.* A charge of criminal wrongdoing can be as embarrassing and economically damaging to a corporation as to an individual. Indeed, a corporation charged with a crime must, like an individual, be concerned not only with the verdict of "the jury but [with] the verdict of the community as well." *Price* v. *Georgia,* 398 U.S. 323 at 331 n.10 (1970).* Moreover, the expense of defending repeated prosecutions and appeals would burden a corporation just as surely as it would an individual.

The government stresses that a corporation is "insensate and feel[s] no 'anxiety' or 'insecurity'" (Pet. 11).

* Other areas of the law recognize and protect a corporation's business reputation. For example, it is settled that a corporation may recover in an action for libel. See, *e.g., Maytag Co.* v. *Meadows Mfg. Co.,* 45 F.2d 299, 302 (7th Cir. 1930), *cert. denied,* 283 U.S. 843 (1931); W. L. Prosser, *The Law of Torts* 745 (4th ed. 1971).

The lower courts have not been so myopic. In several cases, courts have dismissed indictments against corporations on due process and double jeopardy grounds, specifically finding that multiple prosecutions by the government amounted to "harassment" of the corporate defendants. *United States* v. *United States Gypsum Co.*, 404 F.Supp. 619 (D.C. D.C. 1975); *United States* v. *American Honda Motor Co.*, 273 F.Supp. 810 (N.D. Ill. 1967); *United States* v. *American Honda Motor Co.*, 271 F.Supp. 979 (N.D. Cal. 1967). In the *Honda* cases, the courts stressed that multiple prosecutions require repeated responses to subpoenas and subpoenas *duces tecum* and that "this is precisely the sort of harassment which fundamental fairness and the due process clause prohibit." 273 F.Supp. at 820; see also 271 F.Supp. at 988. As the Court of Appeals noted below, the government, in contending that corporate crimes are merely regulatory violations punishable by fines, "seeks to avoid the concept of governmental harassment and oppression which is a basic ingredient of the resistance to double jeopardy" (Pet. App. A, 5a-6a).

Thus, the basic policies underlying the Double Jeopardy Clause's rule against multiple trials—the prevention of prosecutorial abuse, the avoidance of wrongful convictions, and the protection against expense, embarrassment and harassment—apply as fully when the defendant is a corporation as when the defendant is an individual. When the interests of the owners and managers of a corporate defendant, particularly the cost to the shareholders of defending repeated prosecutions and the embarrassment, expense, ordeal and insecurity suffered by managers, are taken into account, the applicability of these policies to

the prosecution of a corporation is obvious.* To strip a corporation of double jeopardy protection is to indirectly penalize these individuals for doing business in the corporate form. The government maintains, however, that their interests are irrelevant, for "[a] person seeking to do business as a corporation must take the bitter with the sweet" (Pet. 16). The government supports this argument by analogy to the rule that a corporation is not a "person" entitled to Fifth Amendment protection against self-incrimination, a rule which may indirectly have the effect of denying the privilege to an individual. This analogy is misconceived.

c. The rule that a corporation is not a "person" within the meaning of the Self-Incrimination Clause is not based on a theory that individuals forfeit basic constitutional rights by associating to do business in the corporate form. Rather, the rule stems from historical and practical considerations uniquely relevant to the state's investigatory function. As the Court explained in *Hale* v. *Henkel*, 201 U.S. 43, 74-75 (1906), the exclusion of the corporation from the Self-Incrimination Clause may be traced to the historic power of the state to investigate the affairs of corporations chartered by it. See also *Wilson* v. *United States*, 221 U.S. 361, 384-385 (1911). The modern day relevance of this doctrine of visitorial powers is that as a practical matter corporate records are generally not sufficiently confidential for the privilege to attach. See *Bellis* v. *United States*, 417

* The government does not, and could not, deny that the prosecution of a corporation impinges upon the individuals associated with it. Indeed, the rationale of prosecuting corporations is rooted in the deterrent effects of such prosecutions upon their owners and managers. See *United States* v. *A&P Trucking Co.*, 358 U.S. 121, 126 (1958); *United States* v. *Hilton Hotels Corp.*, 467 F.2d 1000, 1005-1006 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).

U.S. 85, 92 (1974). Moreover, the exclusion of the corporation from the Self-Incrimination Clause has been justified as necessary to avoid setting a precedent with disturbing implications. In *Hale* v. *Henkel, supra,* the Court reasoned that if the agent of a corporation could assert the privilege on behalf of the corporation, it would logically follow that "[a] privilege so extensive might be used to put a stop to the examination of every witness who was called upon to testify . . . whether . . . [his] principal were an individual or a corporation." 201 U.S. at 70.

These factors are inapposite in the determination of a corporation's rights under the Double Jeopardy Clause. The historic power to investigate does not imply a power to reprosecute; the privacy element of the Self-Incrimination provision is absent in the Double Jeopardy Clause; and equal treatment of corporations and individuals for double jeopardy purposes hardly thwarts the efficacy of the criminal justice system, as might the recognition of a derivative self-incrimination privilege. Thus, the government's contention that since a corporation is not a "person" within the Self-Incrimination Clause, it is not a "person" within the Double Jeopardy Clause, is without merit.*

* If a corporation's rights under the Double Jeopardy Clause are to be analogized to its rights under another provision of the Fifth Amendment, the Due Process Clause provides a ready frame of reference. As early as 1889, the Court held that a corporation is protected against the deprivation of its property without due process of law. *Minneapolis & St. Louis Ry. Co.* v. *Beckwith,* 129 U.S. 26, 28. This rule recognizes the legitimate property interests of the shareholders of a corporation and extends due process protection to them by granting such protection to the corporation itself. *Railroad Tax Cases,* 13 F. 722, 746-747 (9th Cir. 1882). Since the conviction

(footnote continued on next page)

Moreover, the government's effort to characterize double jeopardy protection as "personal" in nature is severely undercut by the fact that the Court, commencing with the very case of *Hale* v. *Henkel,* has consistently held that a corporation enjoys Fourth Amendment protection against unreasonable searches and seizures. See *G. M. Leasing Corp.* v. *United States,* 97 S. Ct. 619, 629 (1977). If the protections of the Fourth Amendment are available to a corporation despite its artificial nature, there is no sound reason why double jeopardy protection is not equally appropriate. The protection against double jeopardy is no more "personal" than the "right of the people to be secure in their persons, houses, papers and effects," and both guarantees serve equally to restrain the state from overzealous conduct.

d. Our position that a corporation should enjoy the protections of the Double Jeopardy Clause is not undercut by the history of the Clause. We recognize that at common law a corporation was considered incapable of committing a criminal act, *New York Central and Hudson River Ry. Co.* v. *United States,* 212 U.S. 481, 492 (1909), and that as a consequence the application of the Clause to the corporate defendant was most likely not contemplated by the drafters of the Fifth Amendment. This fact, however, does not resolve the issue presented here. *Dartmouth College* v. *Woodward,* 17 U.S. (4 Wheat.) 250, 307 (1819). Indeed, it would be quite anomalous if the modern rejection of

of a corporation involves, at the very least, a deprivation of its property through the imposition of a fine, the due process rights of a corporation and its shareholders, which embrace double jeopardy concerns, *Benton* v. *Maryland,* 395 U.S. 784, 794 (1969); see also *United States* v. *Wilkins,* 348 F.2d 844, 854 (2d Cir. 1965), *cert. denied,* 383 U.S. 913 (1966), should preclude such a deprivation from occurring in a manner violative of the Double Jeopardy Clause.

the "old and exploded doctrine that a corporation cannot commit a crime," *New York Central and Hudson River Ry. Co.* v. *United States, supra* at 496, created a new type of defendant which the government could prosecute unrestrained by historic safeguards such as those embodied in the Double Jeopardy Clause.

This Court has never accepted such a view. On the contrary, the Court has stated that "[i]n organizing itself as a collective body [a corporation] waives no constitutional immunities appropriate to such body." *Hale* v. *Henkel,* 201 U.S. 43, 76 (1906). In light of the policies underlying the Double Jeopardy Clause, it is abundantly clear that immunity against double jeopardy is appropriately extended to the corporation.

The government argues necessity in its favor. It claims that "many of these business regulatory statutes are complex and raise sophisticated legal issues in their application; judicial resolution of problems and uncertainties in the law is hindered by lack of access to appellate consideration of disputed questions" (Pet. 9).* All of this may be

* As is true of much of the government's argument, this statement could be made in support of appellate review of acquittals of individual defendants. Individuals, too, may be held criminally liable under the federal "regulatory" statutes cited by the government (Pet. 8 nn. 11 & 12), several of which provide for substantial penalties. See, *e.g.,* 15 U.S.C. (Supp. V) §§1, 2 (Sherman Act) ($~~50~~100,000 fine and/or ~~one~~ three year's imprisonment); 33 U.S.C. (Supp. V) §1319 (water pollution) ($25,000 fine per day and/or one year's imprisonment); 42 U.S.C. (Supp. V) §4910 (noise) ($25,000 fine per day and/or one year's imprisonment). The government understandably does not urge that appellate clarification is needed with respect to the application of these statutes to individuals. Yet, certainly the statutes do not become more complex simply because the defendant is a corporation. Thus, the logical fallacy of the government's argument is again patent here; the government simply does not explain why individual and corporate defendants should be treated *distinctively.*

true, but it is a novel jurisprudence that urges the complexity and sophistication of the criminal law as a reason why an acquitted defendant should endure a government appeal and the possibility of a second trial. If the law is so unfathomable that "identically situated corporations may receive different treatment, depending on the judge who tries the case" (Pet. 8-9), it hardly follows that the defendant should pay the price for overly complex statutes, or conflicting judicial interpretations of those statutes.

Conclusion

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Certificate of Service

I, JOHN W. CASTLES 3d, a member of the Bar of the Supreme Court of the United States and one of the counsel for Respondent in the above-captioned matter, hereby certify that three (3) copies of this Brief for Respondent in Opposition have been served upon the Solicitor General, Department of Justice, by depositing the same in the United States Postal Office with postage prepaid, this 9th day of March, 1977, as follows:

Solicitor General
Department of Justice
Washington, D.C. 20530

All persons required to be served have been served.

JOHN W. CASTLES 3d